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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 675

IRVING D. FRIEDMAN,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of New York

MOTION OF RAILROAD APPELLEES TO AFFIRM

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Appellees Illinois Central Railroad Company, The Alabama and Vicksburg Railway Company, and Vicksburg, Shreveport & Pacific Railway Company,* pursuant to Rule 16, paragraph 1, of the Revised Rules of the Supreme Court of the United States, hereby move that the order of the three-judge District Court be affirmed.

*Hereafter called "Illinois Central," "Alabama," and "Vicksburg," respectively.

This is a direct appeal from the final judgment entered December 23, 1958, by a District Court of three judges specially constituted pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325, and 5 U.S.C. §1009, dismissing appellant's complaint which sought to set aside an order of the Interstate Commerce Commission. Notice of appeal was filed December 26, 1958, and the case was docketed in this Court January 29, 1959.

The issue in this appeal is the validity of the Commission's order of April 14, 1958, in *Illinois Central Railroad Company—Merger—Alabama & Vicksburg Railway Company, Etc.*, Finance Docket No. 19677, and *Illinois Central Railroad Company—Merger—Vicksburg, Shreveport & Pacific Railway Company, Etc.*, Finance Docket No. 19678. These cases were heard by the Commission on separate records, but were disposed of by a single report and order, which are attached as Exhibit A to the complaint filed in the District Court. The Commission's decision is reported as *Illinois Central R. Co. Merger*, 295 I.C.C. 731. The Commission's order approves and authorizes—

> "mergers of the properties of The Alabama and Vicksburg Railway Company and the Vicksburg, Shreveport & Pacific Railway Company into the Illinois Central Railroad Company for ownership and continued management and operation, upon the terms and conditions in said report found just and reasonable."

Pursuant to previous Commission authorization, the Illinois Central has for some years owned a majority of the capital stock of both the Alabama and the Vicksburg, and has controlled and operated those lines, as integral parts of its own operations, under leases which expire July 1, 2282. By the terms of these leases the Illinois Central pays to each lessor, as rental, a sum not exceeding

$5,000.00 a year, equal to the reasonable corporate expenses of each lessor; all taxes on the leased properties; the interest on each lessor's funded debt; and an amount equal to $6.00 per share on the outstanding stock of the Alabama and $5.00 per share on the outstanding stock of the Vicksburg.

On January 16, 1957, the Illinois Central, Alabama, and Vicksburg executed agreements providing for the merger of the Alabama and the Vicksburg into the Illinois Central. Under these agreements, which are to become effective only upon approval of the Interstate Commerce Commission, the stock of the Alabama and the Vicksburg is to be exchanged for cash or Illinois Central stock on the basis of $155.00 per share for Alabama stock and $126.50 per share for Vicksburg stock.

On February 21, 1957, applications for authority to merge were filed with the Commission. Hearings on the applications were held before a Hearing Examiner, briefs were filed, a proposed report was served upon the parties by the Examiner, exceptions thereto were filed by the present appellant to which these present appellees replied, and the cases were thereafter orally argued before Division 4 of the Commission. By report and order dated April 14, 1958, the Commission, by Division 4, approved the terms of the proposed mergers, subject to conditions not here relevant. The present appellant filed a petition for reconsideration which was denied by the entire Commission.* Appellant then filed suit in the court below,

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*At the time of the order under attack appellant owned about one per cent of Alabama's outstanding stock and one half per cent of Vicksburg's outstanding stock.

which heard arguments December 8, 1958, and which on December 23, 1958, filed its opinion and entered judgment dismissing the complaint.

Appellant's Jurisdictional Statement indicates substantial agreement with the statement made in the District Court's opinion that this case involves three questions: (1) are the leases legal impediments to a merger; (2) is the compensation of $155.00 per share for appellant's Alabama stock and $126.50 per share for appellant's Vicksburg stock, which he is offered under the terms of the mergers, an illegal confiscation of appellant's property; and (3) did the Commission err in not considering evidence of the values of the leased railroads.

It is submitted that the answers to these questions are so obvious that the order of the District Court should be affirmed without argument.

1. The Leases Are Not Legal Impediments to the Mergers

Appellant's principal contention is that under the leases of the Alabama and the Vicksburg, and under the endorsements on the Alabama and the Vicksburg stock certificates, annual $6.00 and $5.00 dividends are due and owing to him as a stockholder of Alabama and of Vicksburg. He claims that the leases and endorsements constitute "contracts" with him, that the Illinois Central has an obligation to pay such sums, not to the lessors as rental, but to him as dividends, for the duration of the leases, that he therefore has the status of a "landlord and creditor" of the Illinois Central, and that "the Commission committed error by authorizing the leases to be cancelled, depriving the Alabama and the Vicksburg leased line stockholders of their $6.00 and $5.00 annual payments, which they had a right to receive for the next 323 years." He asserts that the Illinois Central's obligation under the

leases and its guarantees to make payments of a sum equal to $6.00 and $5.00 per share on the outstanding stock of the Alabama and the Vicksburg, respectively, run to him as a stockholder.

This argument is without foundation. It is not possible to state the matter any more clearly and succinctly than did the District Court, and we respectfully refer the Court to that part of the District Court's opinion appearing at pages 20-22 of appellant's Jurisdictional Statement. It is a complete answer to appellant's argument.

The mergers are not "a device to break a long-term lease," as the Jurisdictional Statement contends. There is no "breach of contract." The lessee's promises run only to the lessors, not to the lessors' stockholders. The stockholders are neither third-party beneficiaries nor donee beneficiaries of the lessee's promises to the lessors. Appellant's claim that the Illinois Central is under any contractual duty to him cannot be sustained.

Moreover, Article Nine, Section 2, of each lease specifically permits the merger of the lessor and the lessee, and provides for the cessation of rental payments under the lease in case of such merger. Appellant's claim that the leases are legal impediments to the mergers is wholly without foundation.

2. The Mergers Would Not Constitute an Illegal Confiscation of Appellant's Property.

Appellant's second point is a corollary of his first. He claims that the lessors and the lessee have no right to terminate the leases because the lessors then would receive less than the total amount of the rental required to be paid over the term of the leases. He says, "Ap-

pellant should receive payment in full of all the rental he is entitled to under the leases, owed to him by Illinois Central." (Jurisdictional Statement, page 12.)

The answer to this argument, again, is that appellant is not a party to either lease and the lessee's obligations run only to the lessors. There is no obligation on the lessee's part to pay anything to appellant. No rights of appellant are being terminated by the merger agreements. As is made clear in the next section of this Motion, under the terms of the mergers appellant will receive the present worth of the stock which he is contributing to the mergers. Appellant's second point is untenable.

3. The Commission Did Not Err in Not Considering Evidence of the Values of the Leased Railroads.

Appellant also argues that—

> "Earning power is the proper standard to use to determine the value of a stock. The Commission did not examine the earning power and values of the 'Alabama' and 'Vicksburg' companies. There is no evidence whatever in the record of the earning power and values of the 'Alabama' and 'Vicksburg' companies, which are being absorbed in this merger. It is therefore impossible to ascertain what they are worth." (Jurisdictional Statement, page 12.)

This argument is contrary to what appellant stated to the District Court. There, he agreed that under the merger agreements he would receive what his stock was worth. The relevant portion of his argument follows:

> "Mr. Friedman: • • • Another reason this merger is contrary to law is that you can't reduce obligations and liabilities by merging. The Illinois Central owes me a contract to pay me $6 a year and $5 a year for

325 years. They have got to owe me the same contract after the merger that they owed me before the merger. They say and they brought witnesses to testify before the Commission that all this type of security is worth is no more than $155 and $126.50 they are willing to pay.

"Judge Swan: Its present worth would be discounted, I suppose.

"Mr. Friedman: *Yes, I agree with them that that is what its present worth is.* In fact, the witnesses before the Commission—

"Judge Ryan: What did you say there? You agree with what?

"Mr. Friedman: *I agree that the prices they want to pay are what the securities are worth,* but I say—

"Judge Ryan: Then how have you been damaged or injured if you make that statement?

"Mr. Friedman: I have been damaged or injured because they have no right to pay me off at what it is worth. In a merger you have to pay or assume liabilities. You can't pay what they are worth." (Transcript of Argument before District Court, pages 12-13. Italics added.)

"Mr. Friedman: * * * I say it is absolutely irrelevant what it is worth. This can be worth $50 or $5,000; they have no right under the law to pay me what it is worth. They have got to pay me what it amounts to. This lease is an obligation that the Illinois Central must first redeem and pay off in full. After the lease is redeemed and terminated, then they can apply to merge.

"But while they owe me the lease and this contract for the payment of fixed dividend for 325 years, that is a legal impediment to a merger.

"Judge Swan: The whole issue, then, really, is whether they do owe you that money, isn't it?

"Mr. Friedman: That is the issue as to whether I am a creditor to whom they owe that money and I say that issue is clear as a matter of law, they do and they have no right to pay me what it is worth. There

is no issue of fact here. *I agree with them what they are worth.*" (*Ibid.*, pages 14-15. Italics added.)

"Mr. Friedman: * * * My contract amounts to this 325 year lease and they have to pay or assume the payment of that lease. What it is worth is completely immaterial in this proceeding and that is where the Commission committed error and I ask you to reverse them." (*Ibid.*, page 19.)

Since appellant agrees that under the merger agreements approved by the Commission he will receive for his stock of each lessor what that stock is worth, the Commission clearly did not err in not considering evidence as to the values of the lessors. Such evidence would not have been relevant in determining whether appellant would receive a "fair economic equivalent" for his stock. *Schwabacher* v. *United States*, 334 U.S. 182, 200.

Appellant's argument is unsound for another reason. As the Commission pointed out in its report, since the Alabama and the Vicksburg have been leased virtually in perpetuity to the Illinois Central for a fixed rental, their stockholders no longer have an interest in the degree to which those companies contribute revenue to the Illinois Central. Regardless of the measure of those revenues, the stock of the lessor companies has a value to whoever owns it measurable solely by the payments made to the companies by the lessee. Those payments do constitute the earnings and revenues of the Alabama and the Vicksburg. The "value" of the companies has no bearing on the worth of the stock. This was the holding also of the District Court, which said:

"Plaintiff as a stockholder in Alabama and Vicksburg may have an interest in their separate earning power in 2282, if the leases are not renewed, but at present his only ascertainable interest is in the rental

they produce. As said in *Old Colony R. Co.* v. *New York, N. H. & H. R. Co.*, 2 Cir. 98 F. 2d 670, 672, '• • • it is a fanciful notion that one may forecast the future value of a railroad half a century hence.' "

Appellant's final point, like his others, is without foundation.

CONCLUSION.

For the foregoing reasons it is clear that this appeal presents no substantial questions. It is therefore respectfully submitted that the order of the District Court dismissing the complaint should be affirmed.

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